

L&S Research Corporation Proposed Consent Agreement (1994)

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Jeffrey A. Babener, principal attorney in the Portland, Oregon, law firm Babener & Associates, and editor of www.mlmllegal.com, represents many of the leading direct selling companies in the United States and abroad.

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L&S Research Corporation Proposed Consent Agreement (1994)

Case: L&S Research Corporation Proposed Consent Agreement (1994)

Subject Category: Consent Agreement

Agency Involved: FTC

Complaint Synopsis: The FTC claimed that L&S Research claimed that its products were effective in achieving results that were not supported by reliable scientific research.

Consent Details: L&S Research Corporation manufactured weight loss and body building supplements marketed under the Cybergencis trade name. The company agreed to stop advertising that the product would be effective in helping the user gain muscle or lose fat and that the product would work for all users. The company also agreed to stop using before and after photographs in the marketing of their products unless the photographs represent the typical experience of the users and the photographs are true representations. The company further agreed to pay a fine of \$1.45 million, and maintain records of their compliance with the consent agreement.

Practical Importance to Business of MLM/Direct Sales/Direct Selling/Network Marketing/Party Plan/Multilevel Marketing: Photographs used to demonstrate a product's efficacy must properly demonstrate the typical experience of users, just as endorsements and client testimony are required to.

L&S Research Corporation Proposed Consent Agreement (1994) , File No. 912 3004 :

L&S Research Corporation manufactured weight loss and body building supplements marketed under the Cybergencis trade name. The company agreed to stop advertising that the product would be effective in helping the user gain muscle or lose fat and that the product would work for all users. The company also agreed to stop using before and after photographs in the marketing of their products unless the photographs represent the typical experience of the users and the photographs are true representations. The company further agreed to pay a fine of \$1.45 million, and maintain records of their compliance with the consent agreement.

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[Federal Register: July 27, 1994]

FEDERAL TRADE COMMISSION

[File No. 912 3004]

L&S Research Corporation, et al.; Proposed Consent Agreement With

Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would

require, among other things, the New Jersey corporation and its officer to pay \$1.45 million to the United States Treasury, would prohibit the respondents from making misrepresentations regarding the efficacy of their bodybuilding and weight loss products, and would require them to possess competent and reliable scientific evidence to substantiate future bodybuilding and weight loss claims.

DATES: Comments must be received on or before September 26, 1994.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT:

Richard Cleland or Nancy Warder, FTC/S-4002, Washington, D.C. 20580.
(202) 326-3088.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record

for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Before Federal Trade Commission

In the matter of L&S Research Corporation, a corporation, and Scott Chinery, individually and as an officer of said corporation.

File No. 912-3004.

Agreement Containing Consent Order To Cease and Desist

The Federal Trade Commission, having initiated an investigation of certain acts and practices of L&S Research Corporation, a corporation, and Scott Chinery, individually and as an officer of said corporation, and it now appearing that L&S Research Corporation, a corporation, and Scott Chinery, individually and as an officer of said corporation, hereinafter sometimes referred to as proposed respondents, are willing to enter into an agreement containing an Order to cease and desist from the use of the acts and practices being investigated,

It is hereby agreed by and between L&S Research Corporation, by its authorized officer, and Scott Chinery, individually and as an officer of said corporation that,

1. (a) Proposed respondent L&S Research Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 450 Oberlin Ave., S., in the City of Lakewood, State of New Jersey.

(b) Proposed respondent Scott Chinery is an officer of said corporation. He formulates, directs, and controls the policies, acts, and practices of said corporation, and his principal place of business is located at the above stated address.

2. Proposed respondents admit all the jurisdictional facts set forth in the draft complaint here attached.

3. Proposed respondents waive:

(a) any further procedural steps;

(b) the requirement that the Commission's decision contain a statement of facts or conclusion of law;

(c) all rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered pursuant to this agreement; and

(d) all claims under the Equal Access to Justice Act.

4. This Agreement shall not become part of the public record in the proceeding unless and until it is accepted by the Commission. If this Agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of the Agreement and so notify the proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This Agreement is for settlement purposes only and does not constitute an admission by the proposed respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the draft complaint here attached, or that proposed respondents have engaged in any other unlawful conduct.

6. This Agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Sec. 2.34 of the Commission's Rules, the Commission may, without further notice to the proposed respondents, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision concerning the following Order to cease and desist in disposition of

the proceeding, and (2) make information public in respect thereto.

When so entered, the Order to cease and desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders.

The Order shall become final upon service. Delivery to the U.S. Postal Service of the complaint and decision containing the agreed-to Order to proposed respondents' addresses as stated in this agreement shall constitute service. Proposed respondents waive any right they may have to any other manner of service. The complaint may be used in construing the terms of the Order, and no agreement, understanding, representation, or interpretation not contained in the Order or the Agreement may be used to vary or contradict the terms of the Order.

7. Proposed respondents have read the proposed complaint and Order contemplated hereby. They understand that once the Order has been issued, they will be required to file one or more compliance reports showing they have fully complied with the Order. Proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the Order after it becomes final.

8. If it is accepted by the Commission, this Agreement constitutes a full settlement between the Commission and proposed respondents as to the activities alleged in the complaint to have constituted violations

of the Federal Trade Commission Act and which occurred prior to the date of entry of the Order. As to those activities alleged in the complaint, and which occurred prior to the date of entry of the Order, the Commission hereby releases the proposed respondents from all other further liability to the Commission.

Order

For purposes of this Order the following definitions apply:

A. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence, based on the expertise of professionals in the relevant area that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession to yield accurate and reliable results.

B. "Substantially similar product" shall mean any product that is substantially similar in composition, in terms of the types of ingredients that it contains, or possesses substantially similar properties.

I

It is ordered That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery,

individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the product component of Cybergencis Total Body Building System, Cybergencis for Hard Gainers, or any substantially similar product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Any such product component causes a user of such product to achieve greater or more rapid loss of fat or gain of muscle than a non-user of such product; or

B. Any such product component works for all users.

II

It is further ordered That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Cybergencis Mega-Fat Burner Tablet (also known

as Super Fat-Loss Tablet) [referred to herein as Cybergenics Mega-Fat Burner Tablet], or the product component of Cybertrim, Cybergenics QuickTrim, or any substantially similar product, in or affecting commerce, as ``commerce'' is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Any such product component or Cybergenics Mega-Fat Burner Tablet causes a user of such product to maintain weight loss longer than a non-user of such product; or

B. Any such product component or Cybergenics Mega-Fat Burner Tablet provides a benefit to a maturing person who uses such product which causes that person to lose more weight than a non-user of such product.

III

It is further ordered That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Cybergenics Mega-Fat Burner Tablet, or the product component of Cybergenics Total Body Building System, Cybergenics for Hard Gainers, Cybertrim, Cybergenics QuickTrim, or any

substantially similar product, (do forthwith cease and desist from representing, directly or by implication, contrary to fact, that scientific evidence demonstrates that:

A. Any such product intended for body building causes a user to lose more fat or gain more muscle than a non-user of such product; or

B. Any such product intended for weight or fat loss causes a user to lose more fat or weight than a non-user of such product.

IV

It is further ordered That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, individually and as an officer of said corporation and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as ``commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Any such product or program causes, assists, or enables a user to lose or control weight or fat loss, or maintain weight or fat loss, or to suppress hunger or appetite;

B. Any such product or program causes, assists, or enables a user

to achieve muscle gain or development;

C. Any such product or program works for all users;

D. Chromium picolinate in any such product, or used in conjunction with any such program, builds muscle, reduces fat, or lowers cholesterol; or

E. Any such product or program intended for body building, weight loss, or fat loss is more effective than other products or programs intended for similar purposes; unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

V

It is further ordered That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR Sec. 255.0(b)), including "before" and "after"

pictures) of a product or program represents the typical or ordinary experience of members of the public who use the product or program, unless at the time of making such representation, the representation is true, and respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation, provided, however, respondents may use such endorsements, including accurate "before" and "after" pictures, if the statements or depictions that comprise the endorsements are true and accurate, and if respondents disclose clearly and prominently and in close proximity to the endorsement what the generally expected performance would be in the depicted circumstances or the limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

VI

It is further ordered That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting

commerce, as ``commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that:

A. Any such product or program is new or unique; or

B. The ease of use of, or lack of effort required by, any such product or program intended for weight or fat loss if achieving the advertised results depends on adhering to a special diet or exercising.

VII

It is further ordered That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as ``commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

VIII

It is further ordered That within five (5) business days of the date of service of this Order, respondent L&S Research Corporation, or

its successors and assigns, shall pay the sum of one million four hundred fifty thousand dollars (\$1,450,000.00) to the United States Treasury. Such payment shall be by cashier's check or certified check made payable to the United States Treasury. In the event of default of payment, which default continues for more than ten (10) days beyond the due date of payment, and without any notice required to be given to the respondents:

A. Respondent shall also pay interest as computed under 28 U.S.C. Sec. 1961, which shall accrue on the unpaid balance from the date of default until the date the balance is fully paid;

B. Individual respondent Scott Chinery shall become liable for the full unpaid balance and interest; and

C. The Commission may draw the balance of the payment due on the Irrevocable Standby Letter of Credit, which has been provided by respondent as security for the payment provided for herein.

No portion of the payment herein described shall be deemed a payment of any fine, penalty, or punitive assessment against respondents with respect to the acts and practices which are the subject of the Complaint and which occurred prior to issuance of the Order.

IX

It is further ordered That the corporate respondent L&S Research

Corporation shall for five (5) years following the service of this Order, notify the Commission at least thirty (30) days prior to any change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the Order, or of any change in the position and responsibilities of the individual respondent Scott Chinery in regard to L&S Research Corporation or any subsidiary of which he is an officer. The expiration of the notice provisions of this part shall not affect any other obligation arising out of this Order. In addition, respondents shall require, as a condition precedent to the closing of the sale or other disposition of L&S Research Corporation or the right to the use of the name Cybergenics or to market any of the products in its product line, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of this Order.

X

It is further ordered That the individual respondent Scott Chinery promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the date

of service of this Order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provisions of this part shall not affect any other obligation arising under this Order.

XI

It is further ordered That for five (5) years after the last date of dissemination of any representation covered by this Order, respondents, or their successors or assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

XII

It is further ordered That respondent L&S Research Corporation

shall:

A. Within thirty (30) days after service of this Order, provide a copy of this Order to each of respondent's current principals, officers, directors and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this Order;

B. For a period of five (5) years from the date of entry of this Order, provide a copy of this Order to each of respondent's principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this Order who are associated with respondent or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position; and that respondent secure from each such person a signed statement acknowledging receipt of said Order.

XIII

It is further ordered That the respondents herein shall within sixty (60) days after service upon them of this Order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from respondents L&S Research Corporation and Scott Chinery.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons.

Comments received during this period will become part of the public record. After sixty (60) days the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Body Building Products

The Commission's complaint charges that the respondents deceptively advertised Cybergenics Total Body Building System and Cybergenics for Hard Gainers, two body building products. According to the complaint, the respondents' advertisements made false and/or unsubstantiated representations that either or both body building products: (1) cause users to lose more body fat and gain more muscle than non-users; (2) cause users to lose body fat and gain muscle more rapidly than non-

users; (3) cause users to gain more muscle than users of other body building products; (4) have been demonstrated by scientific research to cause users to gain more muscle than non-users; (5) work for all people; and (6) are new and unique.

Weight Loss Products

The Commission's complaint also charges that the respondents deceptively advertised their weight loss products, Cybergenics CyberTrim, Cybergenics Mega-Fat Burner, and Cybergenics QuickTrim. According to the complaint, the respondents' advertisements made false and/or unsubstantiated representations that one or more of the weight loss products: (1) cause users to lose body fat and weight more rapidly than non-users; (2) cause users to lose weight and lose or burn more body fat than non-users; (3) cause users to lose more body fat and weight than users of all other weight loss products; (4) cause users to lose weight more rapidly than the users of all other weight loss products; (5) are superior to other appetite suppressants; (6) suppress hunger and the biochemical message stimulated by the catabolism of fat; (7) cause users to gain more muscle than non-users; (8) contain an ingredient, chromium picolinate, that has been clinically proven to reduce fat and lower cholesterol; (9) are new and unique; (10) cause

users to maintain weight loss longer than non-users; (11) cause maturing women to lose more weight than non-users of the product; (12) are easy to use; and (13) have been demonstrated by scientific evidence to cause users to lose more fat and weight, and to gain more muscle, than non-users.

Use of Testimonials

The Commission's complaint also charges that statements and depictions, including "before" and "after" pictures, in the respondents' advertisements for their body building and weight loss products, represent that the testimonials from consumers who use the advertised product reflect the typical or ordinary experience of members of the public who use the products. According to the complaint, the respondents did not have a reasonable basis for this representation.

In addition, the complaint alleges that the use of a picture of a man in an advertisement for Cybergenics Total Body Building System "before" and "after" he used the product for six months is false and misleading. The man pictured in the advertisement, according to the complaint, was a champion body builder prior to the time when the "before" picture was taken and, therefore, is not typical of users of

the product, and his results as shown in the "after" picture are not typical of the experience of ordinary members of the public who use the product.

Proposed Order

Part I of the proposed order prohibits representations that the product component of either of the body building products named in the complaint, or any substantially similar product:

(1) causes users to achieve greater or more rapid loss of fat or gain of muscle than non-users of the product; or

(2) works for all users.

Part II of the proposed order prohibits representations that the product component of any of the three weight loss products named in the complaint, or any substantially similar product:

(1) causes users to maintain weight loss longer than non-users; or

(2) causes maturing women to lose more weight than non-users.

Part III prohibits respondents from representing that scientific evidence establishes that the product component of any of the body building and weight loss products named in the complaint causes users to lose more fat or weight, or gains more muscle, than non-users.

Part IV requires the respondents to cease from making a number of

representations about any product or program unless they have substantiation consisting of competent and reliable scientific evidence. The claims that are prohibited unless substantiated are as follows:

- (1) that any product or program causes or assists users to lose fat or weight or to maintain weight loss, or suppresses hunger or appetite;
- (2) that any product or program causes or assists in muscle gain or development;
- (3) that any product or program works for all users;
- (4) that chromium picolinate in any product or used in conjunction with any program builds muscle, reduces fat, or lowers cholesterol; and
- (5) that any product or program intended for body building, weight loss, or fat loss is more effective than other products or programs intended for similar purposes.

Part V of the proposed order requires respondents to have substantiation, which when appropriate must consist of competent and reliable scientific evidence, for believing that endorsements, including ``before" and ``after" pictures, represent the typical or ordinary experience of users of any product or program. However, the respondents may use any endorsement if they disclose clearly and prominently in close proximity to the endorsement what the generally expected performance would be in the depicted circumstances, or that

consumers should not expect to achieve results similar to those of the endorser.

Part VI prohibits the respondents from misrepresenting that any product or program is new or unique, or that any product or program intended for weight loss is easy to use if achieving the advertised results requires a special diet or exercise.

Part VII requires the respondents to cease misrepresenting the contents, validity, or results of any study in connection with the marketing or any product or program.

Part VIII requires the respondents to pay \$1,450,000 to the United States Treasury and provides that none of this amount is deemed to be a fine, penalty, or punitive assessment.

The remaining provisions are standard record keeping and reporting provisions designed to ensure that the respondents remain in compliance with the other provisions of the order.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Donald S. Clark,

Secretary.

Concurring Statement of Commissioner Mary L. Azcuenaga in L&S Research Corporation, File No. 912-3004

The Commission has strong evidence supporting the central allegations in this complaint, and I have voted to accept the consent agreement for public comment. In my view, however, the complaint should not allege that the maintenance claim for Mega-Fat Burner and the maturing women weight loss claim for QuickTrim were false. I am inclined to believe that the claims are false but I would prefer to have some corroborating evidence of falsity before finding reason to believe that Section 5 of the FTC Act has been violated. Because the available information shows only that there is no evidence that these claims are true, it seems to me more appropriate to allege that they are unsubstantiated.

In addition, the QuickTrim weight loss allegations seem inconsistent in light of the evidence. The complaint alleges that the weight loss claim for maturing women users of QuickTrim is false but alleges that the same claim for all users of QuickTrim is unsubstantiated. Yet we have no evidence indicating that the weight loss claims are any more likely to be false for maturing women than for users generally.

I therefore do not support the complaint to the extent that the

maintenance claim for Mega-Fat Burner and the maturing women weight

loss claim for QuickTrim are alleged to be false, not

unsubstantiated.

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